

which they pass. The process of obtaining municipal authority to access state trunk highways is an excruciatingly slow one and hardly comparable to the permit process that the Developer faces. Additionally, constructing a network on state trunk highways can be a cumbersome endeavor. Street intersections bisect state trunk highways frequently and access is otherwise uncontrolled. Unlike the Developer, which will move along rapidly on its cable plow, the competitor on an adjacent state trunk highway will have to contend with multiple obstacles, requiring numerous delays.

18. Second, railroad rights-of-way are prohibitively expensive to access because railroad companies are under no legal compulsion to make access available.²⁴ Even if they were affordable, railroad rights-of-way are inferior to freeway rights-of-way. Railroads do not duplicate the coverage of freeways in the state and are not conveniently located within population centers.²⁵ Furthermore, it is burdensome to engage in construction on railroad rights-of-way because they tend to be narrow and, as a consequence, one must conduct construction around train schedules.
19. Third, rights-of-way over which oil pipelines travel are not much better than railroad rights-of-way. As with railroads, pipeline companies do not have a legal obligation to

²⁴ Section 224(a)(1) of the Communications Act of 1934 specifically excludes railroads from the obligation to provide access to rights-of-way. 47 U.S.C. § 224(a)(1) (1996).

²⁵ With Minnesota's policy of railroad abandonment, I suspect that railroad companies have given many of the rights-of-way (shown on the map in Exhibit 16 of the Petition) to municipalities to be used as bike paths or jogging trails. In the future, other railroad rights-of-way will be abandoned. Railroad rights-of-way are a diminishing resource and not comparable to the freeway rights-of-way to which the Developer has guaranteed, exclusive access for at least ten years.

provide access to rights-of-way and thus can charge whatever they like. *See* 47 U.S.C. § 224(a)(1) (1996). Indeed, with some pipeline companies becoming telecommunications carriers, they have an incentive to deny other parties access altogether. At any rate, many pipeline companies lack perfected easements, which would permit telecommunications uses of the property. The process of obtaining perfected easements could take years of negotiating with hundreds of individual landowners. In terms of location, pipeline rights-of-way tend not to travel through population centers in a manner desirable to telecommunications carriers. Most pipeline companies seek to minimize potential damage to the community by locating their pipelines away from people. Unlike the Developer, telecommunications carriers using pipeline rights-of-way would have to make special efforts to reach customers.

20. Fourth, the rights-of-way of electric utilities are inferior to freeway rights-of-way because electric companies can deny access on the basis of safety concerns or for lack of space (47 U.S.C. § 224(f)(2)). In trying to build a network as extensive as the Developer's planned network (which will cover 1,000 miles of freeways in Minnesota), telecommunications carriers would likely encounter portions of electric rights-of-way that are inaccessible whatsoever due to safety considerations or space constraints. Unfortunately, the process of accessing electric rights-of-way is complicated by the fact that many electric utilities are entering the telecommunications business. Electric utilities thus become less receptive to facilitating access for reasonable carriers and more prone to resisting their duty to make rights-of-way available under the law.

Safety Considerations Do Not Preclude Allowing Multiple Parties

to Access Freeway Rights-of-Way

21. Minnesota justifies its decision to restrict access to freeway rights-of-way to a single firm on the ground that safety considerations would be compromised by affording multiple parties access. Petition, at 27-28.
22. I disagree that placing a fiber optic network on freeway rights-of-way, but away from the surface of the road, would create the kind of safety hazards that Minnesota suggests.⁴ First of all, freeway rights-of-way can be as wide as 150 yards, especially in the rural areas of the state. The activities of a cable plow operating beyond the shoulder of the road will not disrupt traffic to any appreciable degree. Even in urban areas, where freeway rights-of-way may be narrower, the cable plow (combined with other placement techniques) could operate without coming within at least twenty feet of the roadway. Since installing fiber optic cable on freeway rights-of-way with a cable plow is simple and efficient, carriers can place much of their facilities in the middle of the night (when traffic flow is at its nadir).
23. In addition, fiber optic cable requires virtually no maintenance. There would be very few occasions that a telecommunications carrier ever would have to dig up existing fiber optic cable to make repairs. Normally, after installing fiber optic cable, a carrier needs minimal physical access to the cable itself for twenty years or more. Because freeway rights-of-way enjoy controlled access which reduces the likelihood of a fiber cable being cut or disturbed, this time period may be even longer in this case. Carriers can access the

⁴ It is noteworthy that the Agreement requires the Developer to place its facilities away from the surface of the road. Agreement, § 4.3(b)(i).

electronics driving fiber optic networks at discrete locations situated well away from the surface of the roadway.

24. In short, safety considerations do not counsel against granting multiple parties longitudinal access to freeway rights-of-way.²⁴

Minnesota's Plan for the Developer to Collocate the Fiber Optic Cable of Other Telecommunications Carriers is Unworkable

25. Minnesota claims that the anti-competitive impacts of the Agreement will be countered by the requirement that the Developer collocate fiber optic cable of other telecommunications carriers. Petition, at 10. In this scenario, only the Developer would have physical access to the collocated fiber of telecommunications carriers. The latter would rely on the Developer to operate, maintain, and repair collocated fiber.
26. First, there will be tremendous implementation problems with this collocation arrangement. To my knowledge, ICS/UCN has no experience whatsoever in building or operating fiber optic networks. It is hard to believe that Minnesota expects collocating carriers to rely on ICS/UCN.
27. Second, it is unlikely that any telecommunications carriers will be ready to collocate fiber on August 1, 1998, the date construction must begin under the Agreement. In such a short period of time, it would be very difficult to secure appropriate financing or formulate and implement network design plans. Indeed, carriers that desire to collocate cannot even begin to secure financing and plan a network until after April 1, 1998. On that date, if the

²⁴ Otherwise, Minnesota would have safety problems when the Developer's network parallels the network already in place on the freeway rights-of-way of Hennepin County. See Petition, at 7 n. 7.

Developer does not have sufficient financing, the Agreement terminates. Agreement, § 5.5(a). No carrier will take the risk that efforts to obtain financing and plan a network would be wasted in the event that the Developer fails to secure adequate financing. The fact that Minnesota insisted upon including a drop-dead date for financing in the Agreement, combined with ICS/UCN's lack of experience in implementing fiber optic networks, suggests that the odds of the Developer not being able to secure financing are not remote.

Conclusion

28. MFS has constructed fiber optic cable longitudinally in controlled access freeway rights-of-way in several states. I am not aware of any state that has granted exclusive access to such rights-of-way since the passage of the Telecommunications Act of 1996. To the contrary, in each state where MFS has constructed fiber optic cable in controlled access freeway rights-of-way, the state has accommodated all telecommunications carriers seeking access.
29. This concludes my declaration.

Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: February 5, 1998.



Robert Eide
Senior Vice President, Network Systems Sales
MFS Network Technologies, Inc.

B

Adopted AASHTO
BoD of Directors
10/29/95

PROPOSED POLICY RESOLUTION PPR-95AM-9

Title: Installation of Fiber Optic Facilities
on Highway and Freeway Rights-of-Way

WHEREAS, AASHTO has long maintained a policy in opposition to the longitudinal use of freeway rights-of-way for utilities; and

WHEREAS, there has been and will continue to be rapid growth in telecommunications applications occasioned by and utilizing fiber optics technologies; and

WHEREAS, buried fiber optic cable ~~conduits~~ can be installed with minimal disturbance of existing traffic, require infrequent access for maintenance purpose, can usually be sited to even further minimize disruption or hazard to vehicular freeway users, and in other ways can be distinguished from other types of utilities such as pipelines and electrical transmission facilities; and

WHEREAS, fiber optic technology can be used to enhance Intelligent Transportation System programs and projects; and

WHEREAS, the U.S. Congress is nearing completion of a telecommunications act which inter alia will likely enable the owners of freeway and highway rights-of-way the ability to receive cash and non-cash compensation for the use of such rights-of-way for installation of fiber optic cable ~~conduits~~, and further will likely provide for preemption by the Federal Communications Commission of any state or local laws or regulations which inhibit or deny such use except in defense of the public safety and welfare; and

WHEREAS, at its April, 1995 meeting the Standing Committee on Highways (SCOH) established a Task Force on Utilities in Highway Right-of-Way to evaluate and advise on issues raised by the pending legislation and the subject of fiber optics in highway rights-of-way; and

WHEREAS, the task force and SCOH have further reviewed this subject, and believe that formal action by the Board of Directors is in order.

NOW, THEREFORE, BE IT RESOLVED that the AASHTO Board of Directors acknowledges the distinction between buried fiber optic cables ~~in conduits~~ and other types of utilities, wherein it is deemed permissible to permit the longitudinal use of freeway rights-of-way for the former under appropriate guidelines while retaining existing policy in opposition to the longitudinal use of freeway rights-of-way for other utility types; and

BE IT FURTHER RESOLVED, that the AASHTO Board of Directors requests the Standing Committee on Highways, in consultation with the task force its affected Subcommittees and other AASHTO Committees as appropriate, to prepare appropriate guidelines on the technical, operational, economic and financial aspects of the placement of fiber optic cables ~~in conduits~~ in highway and freeway rights-of-way, for eventual adoption by the Board of Directors and publication by AASHTO.